STATE OF MICHIGAN IN THE SUPREME COURT ON APPEAL FROM COURT OF APPEALS Cavanagh, P.J., Jansen and Gage, J.J.

MICHAEL GRIMES and TAMARA GRIMES, Individually and as subrogers and FARM, BUREAU INSURANCE COMPANY as Subrogees,

Supreme Court No. 127901

Court of Appeals No. 249558

Plaintiffs,

V

ALAN DOUGLAS THISSE and DOUGLAS ALAN THISSE,

Genesee County Circuit Court

No. 00-69126-NI

Defendants,

Joined with:

MICHAEL GRIMES and TAMARA GRIMES,

Court of Claims No. 02-67-MD

Plaintiffs-Appellees,

STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF TRANSPORTATION, a Dept. of the State of Michigan,

Defendant-Appellant	t .
	

BRIEF OF DEFENDANT-APPELLANT MICHIGAN DEPARTMENT OF TRANSPORTATION

ORAL ARGUMENT REQUESTED



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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

On October 6, 2005, the Supreme Court granted Defendant-Appellant's Application for Leave to Appeal the December 16, 2004 judgment of the Court of Appeals.

STATEMENT OF QUESTION INVOLVED

I. The highway exception to governmental immunity imposes tort liability on a state or county road authority for failing to maintain the improved portion of the highway designed for vehicular travel. Highway shoulders are not designed for vehicular travel. Plaintiffs allege that the incident occurred because a vehicle tire rubbed against an edge drop between the paved and gravel portions of a highway shoulder. Does Plaintiffs' shoulder claim fall within the highway exception to governmental immunity?

STATEMENT OF FACTS

The Accident

On Friday, March 24, 2000, Alan Thisse was traveling north on I-75. Plaintiffs allege that Thisse struck a mound of gravel or mud which caused him to leave the roadway to his left onto a shoulder comprised of a three-foot width of asphalt and two feet of gravel. Plaintiffs allege that when Thisse attempted to re-enter the roadway, he encountered a 7 to 8 inch drop where the outer edge of the paved shoulder met the lower gravel shoulder.

Plaintiffs allege this drop-off caused Thisse to lose control of his vehicle, cross back onto the three-lane highway and strike Plaintiffs' vehicle in the far right lane. Plaintiffs allege, *inter alia*, that MDOT is liable for their injuries for its failure to maintain the two-foot portion of the gravel shoulder level with the three-foot paved shoulder that runs along the left side of the three northbound travel lanes of I-75. (Accident Scene Photos, Appendix pp 13-A through 14-A.)

The Trial Court's Opinion

On June 25, 2003, the Court of Claims granted MDOT's motion for summary disposition as to all allegations in Plaintiffs' Complaint other than their claim of a defective shoulder (Trial Court Transcript of August 16, 2003 Hearing pp 8-10, Appendix pp 6-A through 8-A). The trial court held that "plaintiffs provided design plans for the shoulder of the expressway at issue, which certainly show that this roadway was designed with a shoulder that was intended for vehicular travel." (Transcript, p 7, Appendix p 5-A.)

Thus, the trial court concluded that the highway exception to governmental immunity permits a claim of a defective shoulder.

The Court of Appeals' Opinion

On December 16, 2004, the Court of Appeals relied exclusively on *Gregg v State Hwy Dept.* ¹ to uphold the trial court's ruling. (December 16, 2004 Court of Appeals Opinion, Appendix pp 11-A through 12-A.)

¹ Gregg v State Highway Dept., 435 Mich 307; 458 NW2d 619 (1990).

ARGUMENT

I. A shoulder is not part of the improved portion of the highway designed for vehicular travel; therefore a claim of a defective shoulder does not fall within the highway exception to governmental immunity as it applies to state and county highway authorities.

A. Standard of Review

The appropriate standard of review for a Court of Appeals' interpretation of a statute is *de* novo.²

B. Position of the Parties

Plaintiffs' position is that since highway shoulders are intermittently used as a vehicular refuge, they are encompassed within the highway exception to governmental immunity.

Defendant's position is that the shoulders are not within the improved portion of the highway designed for vehicular travel and do not fall within the highway exception to governmental immunity.

C. Lower Courts' Rulings

The trial court in this matter based its denial of MDOT's motion for summary disposition on the pre-Nawrocki v Macomb County Road Commission (Evens v Shiawassee Road Commission) (Nawrocki/Evens)³ case of Gregg v State Hwy Dept,⁴ and its progeny Meek v Dept of Transportation.⁵ (Transcript at pp 6-7, Appendix pp 4-A through 5-A.) The trial court further reasoned (Transcript at p 8, Appendix p 6-A) that since the legislature required maintenance of shoulders under MCL 247.660(C) (along with other highway features) it meant to include shoulders within the meaning of MCL 691.1402(1).

² Grossman v Brown, 470 Mich 593; 685 NW2d 198 (2004).

³ Nawrocki v Macomb County Road Commission, (Evens v Shiawassee Road Commission), 463 Mich 143; 615 NW2d 702 (2000).

⁴ Gregg v State Hwy Dept, 435 Mich 307; 458 NW2d 619 (1990).

⁵ Meek v Dept of Transportation, 240 Mich App 105; 610 NW2d 250 (2000).

In affirming the trial court, the Court of Appeals, without analysis, simply stated that the Supreme Court in *Nawrocki/Evens* did not alter its earlier holding in *Gregg* and therefore the Court of Appeals is bound by the *Gregg* decision.⁶

D. Discussion

1. The Highway Exception.

All discussion of the highway exception begins with the statutory language, MCL 691.1402(1):

[T]he duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. . . .

The phrase "improved portion designed for vehicular travel" is not defined in the statute. The Legislature is presumed to have intended the plain meaning of words used in a statute. Statutory language should be construed reasonably, keeping in mind the purpose of the act. Because the phrase at issue here deals with an exception to the broad grant of immunity confirmed by MCL 691.1401, *et al*, the exception must be narrowly construed. The pertinent and controlling question in applying this limiting phrase is whether MDOT designs shoulders for vehicular travel.

⁶ Grimes v MDOT, Court of Appeals Docket No. 249558, Unpublished Slip Opinion of December 16, 2004 at p 2.

⁷ Attorney General v Sanilac County Drain Commissioner, 173 Mich App 526, 531; 434 NW2d 181 (1988).

⁸ Nelson v Grays, 209 Mich App 661, 664; 531 NW2d 826 (1995).

⁹ Ross v Consumers Power Co., 420 Mich 567, 618; 363 NW2d 641 (1984).

2. Gregg v State Hwy Dep't

In *Gregg v State Hwy Dep't*, ¹⁰ this Court held that a bicyclist who claimed injury from traveling on the inner portion of a shoulder could maintain a cause of action under the highway exception to governmental immunity¹¹:

[B]ecause the palintiff is one of the "class of travelers" included in § 2 and because the area of the road designated for bicycle travel comprised part of the improved portion of the highway designed for vehicular travel as defined in that statute, we reverse the judgment of the Court of Appeals and remand the case to the Court of Claims for proceedings consistent with this opinion.

3. Nawrocki v Macomb County Road Commission (Evens v Shiawassee Road Commission)

In the consolidated cases of *Nawrocki/Evens*¹², the Court sought to clarify highway exception law generally in light of conflicting decisions with the stated purpose of reaching a consensus on what the Legislature intended by the 1964 highway exception. The Court also sought to return to a construction of the highway exception as mandated by *Ross v Consumers Power Co.*¹³ Accordingly, the Court concluded that the state and county's duty under the highway exception does not extend to the installation, maintenance, repair, or improvement of traffic control devices including signs, but is limited exclusively to dangerous or defective conditions within the improved portion of the highway designed for vehicular travel. ¹⁴ That is, the actual road deck, paved or unpaved, designed for vehicular travel.

¹⁰ Gregg v State Hwy Dep't, 435 Mich 307; 458 NW2d 619 (1990).

¹¹ *Gregg*, 435 Mich at 317.

¹² Nawrocki/Evens, 463 Mich at 143.

¹³ *Ross*, 420 Mich at 567.

¹⁴ Nawrocki/Evens, 463 Mich at 151-52.

The Court rejected the dissent's contention that the plain meaning of the words "improved portion of the highway designed for vehicular travel" connotes a broader concept than just the surface of the road itself¹⁵:

We are convinced, however, that quite the opposite is true; while the term "highway" may be broad and potentially ambiguous, the phrase "improved portion" clearly narrows the term "highway" to its physical structure, and the phrase "designed for vehicular travel" further narrows "highway" to the physical roadbed itself. Thus, the dissent is simply wrong, in our judgment, when it states that the language of the highway exception "leaves uncertain whether the space above the highway containing traffic lights is included."

The Court determined that such an expansive interpretation would go far beyond what the highway exception provides. According to the Court a correct interpretation of the highway exception shall extend only to the improved portion of the highway designed for vehicular travel, it does not contemplate "conditions, the source of which do not originate on the surface of the roadbed...."16,17

In the joined cases of Nawrocki/Evens, this Court was confronted with two major questions under the highway exception. The first, in Nawrocki, was whether all classes of highway travelers, those in vehicles, on bicycles, or pedestrians could bring an action against a road authority under the highway exception. The second, in *Evens*, was whether the highway exception limited the state and county road authorities' liability to that portion of the highway designed for vehicular travel.

This Court relied on *Gregg* to answer the first question in *Nawrocki* in the affirmative. ¹⁸

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Nawrocki/Evens, 463 Mich at 175-176, fn 30.

Nawrocki/Evens, 463 Mich at 176 (internal citation and quotation marks omitted).

¹⁷ The Nawrocki/Evens Court acknowledged, 463 Mich at 182, fn 37, that the term "improved portion of the highway designed for vehicular travel" is not coterminous with and is less broad than the term "highway," defined at MCL 691.1401(e).

¹⁸ Nawrocki/Evens, 463 Mich at 168.

[w]e believe *Gregg* properly relied on the "[a]ny person" language of the statute's second sentence to hold that pedestrians are protected by the highway exception and that the words "designed for vehicular travel" serve to define and describe the "improved portion of the highway"; in other words, the *location* where the state and county road commissions' duty arises.

Thus, the term "designed for vehicular travel" did not limit the class of travelers that may bring a cause of action under the highway exception to only motorists. Instead, the term "designed for vehicular travel" referred to the location upon which all types of travelers may raise claims.

In addressing the second question as posed in *Evens*, this Court concluded that state and county road authorities' liability to all travelers is limited to that portion of the highway designed for vehicular travel. The *Gregg* case was not part of the Court's analysis of this second question concerning whether signs and signals fell within that portion of the highway designed for vehicular travel. The only reference to the location of the *Gregg* action was in a footnote under the *Nawrocki* analysis in which this Court simply noted that the "bicycle path in *Gregg* was immediately adjacent to the lanes for vehicular traffic, located between the white line and the shoulder of the road."

In *Nawrocki/Evens* this Court did not address whether the bicyclist in *Gregg* had a cause of action based on the location of his injury on the shoulder of a highway; if it had addressed that question, the analysis of the opinion compels the conclusion that a shoulder is not part of the improved portion of the highway designed for vehicular travel. In granting the Defendant MDOT's application for leave to appeal in this matter, the Court now has the opportunity to specifically address this aspect of the *Gregg* ruling as to whether shoulders are part of the highway designed for vehicular travel.

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¹⁹ Nawrocki/Evens, 463 Mich at 164, fn 21.

To the extent that *Gregg* is inconsistent with the analysis of *Nawrocki/Evens*, it should be overruled. In *Nawrocki/Evens*, the issue of whether shoulders are included within the highway exception was not squarely before the Court. The Court did, however, overrule *Pick v Szymczak*²⁰ which had improperly included signs within the highway exception. In doing so, this Court reiterated those circumstances under which it would overrule prior case law²¹:

[I]n *People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998), this Court recently discussed the proper circumstances under which it would overrule prior case law:

It is true of course that we do not lightly overrule a case. This Court has stated on many occasions that "[u]nder the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Further, . . . "[b]efore this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it. Although we respect the principle of stare decisis, we also recognize the common wisdom that the rule of stare decisis is not an inexorable command. [Citations omitted.]

The Court concluded that less mischief would result from overruling *Pick* than from upholding it²²:

[a]llowing *Pick* to stand, in our judgment, would perpetuate the lack of a principled and consistent application of the law and would permit the continuation of a heightened potential for arbitrary, inconsistent, and highly confused decision making in personal injury or property damage cases involving the state or county road commissions. Such results would be contrary to the statute, undermine other important case law, and impose far more injury upon the judicial process than any effect associated with

²⁰ Pick v Szymczak, 451 Mich 607; 548 NW2d 603 (1996).

²¹ Nawrocki/Evens, 463 Mich at 180.

²² Nawrocki/Evens, 463 Mich at 183.

our decision to apply the policy decisions of the Legislature instead of the policy decisions of this Court in *Pick*.

This Court indicated that under *Pick* there was potentially an inexhaustible list of theories under which a claimant could sue the state or county for inadequate signage on even the most unremarkable thoroughfare.²³ The same considerations apply with respect *Gregg*, under which a plaintiff has a limitless list of potential shoulder inadequacies.

4. The Gregg Analysis of the Highway Exception

The *Gregg* Court began with a less than clear picture of the nature of the roadway upon which the plaintiff was injured. "The State had painted a line demarking a bicycle path running parallel to and seemingly between the traveled portion of the highway and its paved shoulder." Then the Court determined that "Our analysis, therefore, is based on the assumption that the bicycle path at issue comprised part of the inner portion of the shoulder closest to the roadway."

The *Gregg* Court next struggled with earlier holdings that found that installations beyond the travel lanes do not fall within the highway exception. The *Gregg* Court distinguished *Roy v Dept. of Transportation*, ²⁶ because in *Roy* the bicycle path was separate and "detached" from the improved portion. ²⁷ The Court reconciled *Goodrich v Kalamazoo*, ²⁸ by indicating in *Gregg* ²⁹:

[W]e would not disagree that a three-foot-wide dirt and gravel shoulder adorned with an occasional tree is not "designed for vehicular travel" under today's statute or any statute. As in *Goodrich*, we would probably conclude that such a shoulder was also not part of the "improved portion" of the highway.

²³ Nawrocki/Evens, 463 Mich at 179.

²⁴ Gregg, 435 Mich at 310.

²⁵ *Gregg*, 435 Mich at 310.

²⁶ Roy v Dept. of Transportation, 428 Mich 330; 408 NW2d 783 (1987).

²⁷ Gregg, 435 Mich at pp 312-313.

²⁸ Goodrich v Kalamazoo, 304 Mich 442; 8 NW2d 130 (1943).

²⁹ *Gregg*, 435 Mich at 313.

The *Gregg* Court further struggled with the dissent's contention that the Motor Vehicle Code³⁰ described shoulders as not designed for vehicular travel. The *Gregg* Court referred to another provision of the Motor Vehicle Code dealing with snow removal on shoulders³¹

The dissent points to § 59a of the Michigan Vehicle Code, which describes the shoulder of the road, as "not designed for vehicular travel but maintained for temporary accommodation of disabled or stopped vehicles...." M.C.L. § 257.59a; M.S.A. § 9.1859(1). Op. at 625. That the Legislature did not in our view intend this to be a definition of vehicular travel under § 2 of the governmental immunity act is made evident by another section of the Motor Vehicle Code which states: "'Shoulder' means that portion of a highway or street on either side of the roadway which is normally snowplowed for the safety and convenience of vehicular traffic." M.C.L. § 257.1501(k); M.S.A. § 9.3200(1)(k). (Emphasis supplied.)

The dissent responded that the reference in the Motor Vehicle Code³² to the snowplowing of shoulders is consistent with the shoulder's purpose of providing "temporary accommodation of disabled and stopped vehicles" and does not support an argument that shoulders are designed for vehicular travel.³³ Ironically, the *Gregg* majority's reference to snow removal on shoulders was further misplaced in that MCL 257.1501(K) was within that portion of the Motor Vehicle Code dealing with the regulation of snowmobiles and did not relate to travel on the highway.³⁴ These snowmobile provisions were subsequently removed in 1994 from the Motor Vehicle Code and more appropriately placed in the Natural Resources and Environmental Act, thereby being converted from MCL 257.1501, *et seq.* to MCL 324.82101, *et seq.* Thus, the Motor Vehicle Code remains consistent with the highway exception to the Governmental Tort Liability Act³⁵ and supports the conclusion that the Legislature intended that state and county road authority's

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³⁰ MCL 257.1501.

³¹ *Gregg*, 435 Mich at pp 314-315

³² MCL 257.1501(K).

³³ *Gregg*, 435 Mich at 322.

³⁴ Michigan Snow Mobile Act, 1968 PA 74.

³⁵ MCL 257.150, et seq.

tort liability extends no further than the travel lanes and does not include shoulders irrespective of their size or composition.

Even the *Gregg* Court acknowledged that its approach lost its validity in direct correlation to the viability of the shoulder. In other words, the thinner and rougher the shoulder became, the less likely it was designed for vehicular travel and, ergo, not part of the highway exception. Ultimately, *Gregg* recognized that shoulders are designed only for a temporary sanctuary from the travel lanes. Nonetheless, the Court expansively interpreted the highway exception by stating³⁶:

[M]oreover, the contention that the Legislature did not intend to include highway shoulders under the § 2 exception has an obvious flaw; it flies in the face of common experience. Any motorist who has ever experienced a highway emergency understands that shoulders are essential to a safe modern highway. To get on or off a shoulder to stop, park, or leave standing a vehicle, motorists must travel on the shoulder.

At the high speeds of modern vehicles, such an endeavor often results in significant travel, "in the ordinary sense," on the shoulder of a highway. Indeed, it seems quite extraordinary, if not fictional, to assume that vehicles do not travel on shoulders or that shoulders are not designed for vehicular travel, albeit of a temporary sort.

This holistic approach to the highway exception was rejected by Nawrocki/Evens, since many features outside the vehicular travel lanes are essential to a modern highway (signs, signals and guardrails, etc.), and many are designed to be traversed during a highway emergency (medians, transition (gore) areas, shoulders, etc.). The Court in Gregg gave no guidance as to the distinction between a shoulder not designed for vehicular travel and a shoulder that is designed for vehicular travel, and thus subject to the highway exception. This infirmity in its analysis as to shoulders results in the same lack of guidance and is a cause for mischief, which this Court rejected in Nawrocki/Evens.

³⁶ Gregg, 435 Mich at 315.

Gregg, like Pick, adopted the false premise that the Legislature's intent went beyond the clear language of the highway exception and included all road elements deemed essential to a safe highway system. Nawrocki/Evens rejected this notion that the judiciary should determine the proper scope of the highway exception without regard to the Legislature's clear language.

Nawrocki/Evens recognized the courts possess no greater insights than state or county road commissions in matters involving the allocation of limited public highway funds and noted 37:

[W]e are convinced that the legislative process is the appropriate process for apportioning public funds for such expenditures as signage, and that the executive process, involving the road authorities of the state, is the appropriate process for determining the specific forms of signage necessary to produce safe highways. See, e.g. Wechsler v Wayne Co Rd Comm, supra at 588, n 4:

While a particular decision to "improve," "augment," or "expand" a highway may be prudent and advisable, the decision nevertheless is for persons entrusted with the expenditure of taxpayer resources, not the courts.

Ultimately, if the people of this state are dissatisfied with the quality of signage along their highways, they can communicate this dissatisfaction through the selection of representatives to state and local executive and legislative bodies.

Gregg improperly usurped the role of the road authorities in determining that some shoulders should be considered designed for vehicular travel. Most vexing, Gregg placed these road authorities in a conundrum. The more a road authority augments a shoulder for safety, the more likely a court could subsequently consider it designed for vehicular travel. If the Gregg decision is not overruled by this Court, road authorities and trial courts will have no basis for determining what type of shoulder should be considered designed for vehicular travel, albeit of a temporary sort. Even the three-foot wide dirt and gravel shoulder in Goodrich, conceded by

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³⁷ Nawrocki/Evens, 463 Mich at 179, n 35.

Gregg as not designed for vehicular travel, was undoubtedly built to accommodate vehicles on a temporary basis.

Gregg was so ambivalent, ad-hoc, and result-oriented in its reasoning that it noted that its holding may have been different if the bicyclist had been traveling on another portion of the shoulder³⁸:

[W]e think this question would be closer if the bike path had been on the outer fringes of the shoulder, thereby making vehicular travel thereon unlikely, especially if the shoulder was wide enough to accommodate both an automobile and the bike path.

Thus, *Gregg* indicates that there is some gradation in design strategy as a shoulder widens alongside actual travel lanes. Under *Gregg*, if a path or area has some characteristics of a vehicular travel lane, it could be treated as a travel lane under the highway exception even though MDOT has not designed or built the path as a travel lane. Such a result is not tenable in law under the clear language of the highway exception and is inconsistent with highway design principles.

5. Improved Portion of the Highway Designed for Vehicular Travel

On one point MDOT can agree with the *Gregg* majority in that "the crucial issue involves whether the paved shoulder of the road is 'designed for vehicular travel."³⁹ However, rather than look to the MDOT engineers for insight as to what is designed by them to accommodate vehicular travel, the Court attempted to take judicial notice of what "any motorist who has experienced a highway emergency" believes. Though any layperson has the right to analyze or critique his local road regarding its safety features, it is the highway engineer who actually

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³⁸ Gregg, 435 Mich at 317, n 5.

³⁹ *Gregg*, 435 Mich at p 313.

designs and builds the highways, including that portion specifically designated for vehicular travel.

In building a road, highway engineers rely on highway guidelines set forth in *A Policy on Geometric Design of Highways and Streets, American Association of State Highway and Transportation Officials* (AASHTO), Fourth Edition, 2001. This publication defines a shoulder (Appendix, p 18-A) as follows⁴⁰:

A shoulder is the portion of the roadway contiguous with the traveled way that accommodates stopped vehicles, emergency use, and lateral support of subbase, base and surface courses.

AASHTO lists the benefits of shoulders contiguous to the travel lanes (Appendix, p 19-A)⁴¹:

Well-designed and properly maintained shoulders are needed on rural highways with an appreciable volume of traffic, on freeways, and on some types of urban highways. Their advantages include:

- Space is provided away from the traveled way for vehicles to stop because of mechanical difficulties, flat tires, or other emergencies.
- Space is provided for motorists to stop occasionally to consult road maps or for other reasons.
- Space is provided for evasive maneuvers to avoid potential crashes or reduce their severity.
- The sense of openness created by shoulders of adequate width contributes to driving ease and reduced stress.
- Sight distance is improved in cut sections, thereby potentially improving safety.
- Some types of shoulders enhance highway aesthetics.
- Highway capacity is improved because uniform speed is encouraged.
- Space is provided for maintenance operations such as snow removal and storage.
- Lateral clearance is provided for signs and guardrails.
- Storm water can be discharged farther from the traveled way, and seepage adjacent to the traveled way can be minimized. This may directly reduce pavement breakup.

⁴⁰ AASHTO at p 316.

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⁴¹ AASHTO at p 318.

- Structural support is given to the pavement.
- Space is provided for pedestrian and bicycle use, for bus stops, for occasional encroachment of vehicles, for mail delivery vehicles, and for the detouring of traffic during construction.

The widest cement shoulder may have some characteristics similar to a travel lane, but that does not mean it is designed for vehicular travel. For instance, the shoulder does not have the same substructure as the travel lanes. Drainage, strength, and consistency are not as great a concern as with the travel lanes. If the shoulder is asphalt, it may be tapered (or feathered) from very thick near the travel lane to thin near the median.⁴² (Appendix, p 15-A.)

As shoulders shrink and become less viable, their role does not change for the highway engineer. They always remain designed for vehicular storage or refuge. This may require a width of as much as eight feet or as little as three feet, depending on the nature of the adjacent travel lanes, and whether it is an urban highway or a country road. The authorized speed of the travel lanes and the ease of road maintenance may similarly dictate the nature of the shoulder. (Appendix, pp 19-A to 20-A.)

An added purpose of the shoulder is to reinforce the stability of the travel lane and to avoid the risk of a sudden drop-off from the travel lane. Rather than continually grade the gravel shoulder to be drawn up to the level of the travel lane, MDOT often provides a more permanent asphalt or cement three-or-four-foot ribbon (shoulder). Beyond this three-foot shoulder is often additional feet of gravel shoulder and/or perhaps a grassy median. All of this area is traversable to varying degrees in case of an emergency.⁴⁴ (Appendix, p 21-A.)

However, whatever the composition of the shoulder, it is not "designed for vehicular travel." To do so would require the design of adequate sight distance, uniformity of width,

⁴² Plaintiff's Court of Appeals Exhibit E Cross Section of I-75.

⁴³ AASHTO at pp 318-319.

⁴⁴ AASHTO at p 321.

consistency of construction, and all the appropriate signage as is done for travel lanes.⁴⁵ (Appendix, pp 25-A to 26-A.)

Furthermore, no matter how traversable a shoulder becomes, it is evident to a driver that is not designed for vehicular travel. A driver does not expect that a police officer would accept his explanation that he was just using the shoulder as an "auxiliary lane" to bypass bumper-to-bumper rush hour traffic on the travel lanes. To embrace the premise that anything traversable must be "designed for vehicular travel" would require the incorporation of medians. Medians, like shoulders, are designed to be traversed intermittently should a driver need to avoid a collision, or for other emergencies. (Appendix, p 23-A.) However, in *McIntosh v Dep't of Transportation (On Remand)*, the Court of Appeals relied on *Nawrocki/Evens* to hold that a plaintiff's claim of a defective median did not fall within the exception to governmental immunity. See also *Fogarty v Dep't of Transportation*.

MDOT recognizes that it is liable for failing to maintain "the actual physical structure of the roadbed surface." Thus, if MDOT allowed potholes or similar surface defects to exist on a travel lane to the extent that it caused an accident, the highway exception would permit a viable cause of action. However, MDOT deliberately puts surface aberrations into shoulders (rumble strips) in order to alert the inattentive driver that he has wandered off the actual lane "designed for vehicular travel." (Appendix, p 22-A.) Yet, it does not warn of the approaching

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⁴⁵ Manual on Uniform Traffic Control Devices (MUTCD), 2003 Edition at pp 2C-7 & 11.

⁴⁶ AASHTO at p 341.

⁴⁷ McIntosh v Dep't of Transportation (On Remand), 244 Mich App 705, 709; 625 NW2d 123 (2001).

⁴⁸ Fogarty v Dep't of Transportation, 200 Mich App 572, 574; 504 NW2d 710 (1993).

⁴⁹ Nawrocki/Evens, 463 Mich at p 183.

⁵⁰ AASHTO at p 322.

elimination of a shoulder as it does for travel lanes.⁵¹ (Appendix, p 27-A.) Furthermore, appellate courts have recognized that a road authority is not obligated to provide a shoulder, *Soule v Macomb*,⁵² and the Legislature has authorized their de-emphasis for aesthetic purposes.⁵³

MDOT does not maintain a consistency of surfaces on shoulders; they may be partially asphalt or cement and partially gravel. See Plaintiff's Court of Appeals Exhibit E (Appendix, p 15-A.) A path which requires the right wheels to be on asphalt and the left wheels on gravel is not "designed for vehicular travel." The varying frictions of this bifurcated condition would make travel at higher speeds for any length of time both unsafe and undesirable. ⁵⁴ (Appendix, p 17-A.) Yet, this is exactly what Plaintiffs in the instant matter have alleged: that MDOT should be liable for failing to make this shoulder a safe travel lane.

6. Plaintiffs' Allegation of Defective Shoulder

Plaintiffs complain that even though the three-foot asphalt portion of the shoulder had not deteriorated, the gravel portion of this shoulder had not been maintained and caused the loss of control. Plaintiffs allege that Thisse encountered an edge drop more than three feet outside the travel lane, and that the highway exception encompasses their claim of a highway defect between the paved and gravel shoulder. Though MDOT strives to make all improved portions of its highway safe for vehicular travel, including signs, signals, guardrails, medians and shoulders, Plaintiff's accident did not occur on the travel lane, but rather on the shoulder, which under AASHTO standards was not designed for vehicular travel.

⁵⁴ AASHTO at p 309.

⁵¹ MUTCD at p 2C-14.

⁵² Soule v Macomb, 196 Mich App 235; 992 NW2d 783 (1992).

⁵³ MCL 247.953(3).

7. Case Law Post Nawrocki/Evens

The appellate courts have not attempted to reconcile the rationale of *Gregg* with this Court's more recent decision in *Nawrocki/Evens*. However, the courts have consistently found that other off-road traversable highway features are not encompassed by the highway exception. In *McIntosh*, ⁵⁵ plaintiff alleged that MDOT should have widened the median or installed a barrier to prevent cross-over accidents between east and westbound I-96. In relying on *Nawrocki/Evens*, the Court of Appeals correctly concluded that the median was not designed for vehicular travel and was therefore beyond the scope of the highway exception ⁵⁶:

[T]he median between the eastbound and westbound lanes of I-96 is, obviously, outside the actual physical structure of the roadbed surface designed for vehicular travel. It is not a road surface condition. The width of the median and the lack of a median barrier are basically design features. The *Evens* decision makes it clear that defendant had no duty, under the highway exception to governmental immunity, to correct these design defects. *Id.* at 183-184. Defendants' duty only extended to a dangerous or defective condition of the *roadway designed for vehicular travel*. *Id.* There is no dispute that the median area between the eastbound and westbound lanes of I-96 is outside the actual physical structure of the roadbed surface designed for vehicular travel.

In *McIntosh* there was no dispute that the median was not designed for vehicular travel. Likewise, there was no dispute that medians, like shoulders, are traversable and designed as a temporary refuge or recovery area for motorists who stray from the travel lanes.

In *Stevenson v City of Detroit*,⁵⁷ the majority citing *Nawrocki/Evens* rejected the argument that a berm (the area between a travel lane and a sidewalk) falls under the highway exception simply because people may actually be able to travel upon them.⁵⁸

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⁵⁵ *McIntosh*, 244 Mich App at 709-710.

⁵⁶ McIntosh, 244 Mich App at 709-710.

⁵⁷ Stevenson v City of Detroit, 264 Mich App 37; 689 NW2d 239 (2004).

⁵⁸ Stevenson, 264 Mich App at 48.

In Wolfe v Dept of Transportation,⁵⁹ (Appendix, p 28-A to 39-A) the Court of Appeals in an unpublished opinion rejected the notion that a 12 foot wide cement median (concrete divider) fell within the highway exception. Although it does not have precedential effect, its rationale is compelling:

[H]owever, even if we were to conclude that the median preceding the bridge pier constituted the "location" of the accident, the median was not part of the roadbed designed for vehicular travel. The term "designed" means "made or done by design; intended; planned." *Random House College Dictionary* (1988). Pursuant to MCL 257.644, when a highway is divided into two roadways by an intervening space, as in this case, vehicles "shall be driven only upon the right-handed roadway."

Additionally, this statute provides that "a vehicle shall not . . . be driven over, across or within the dividing space, barrier, or section . . ."

Here, the evidence demonstrates that between the seventy-five-foot gap in the median and the bridge pier, a solid yellow line separates the left edge of the southbound lane from the median. Further the twelve-footwide "median" consists of two four-foot-wide valley gutters on either side of a four-foot-wide median that is slight [sic] raised with corrugated rumble strips beginning two-hundred feet before the bridge pier. According to Mark Bott of MDOT, solid lines are restrictive in character, and solid yellow lines delineate the separation of traffic flows in opposing directions and/or mark the left edge of the pavement of divided highways and one-way roads. Additionally, William Taylor, a civil engineer, stated that yellow lines mark the left edge of the pavement, and this in combination with the corrugated rumble strips indicates that the median is not designed or intended for vehicular travel. Further, James Valenta, a licensed professional engineer, indicated that a solid yellow line demonstrates that vehicular travel is prohibited beyond that line, and that the paved median (consisting of the valley gutter and rumble strips) was installed to warn vehicles that they are traveling on an area not so intended. Thus, the design of the M-24 median (i.e., the combination of the solid yellow lines, the placement of the rumble strips, and the bridge pier) in conjunction with the statutory provision (prohibiting vehicles from driving across, over, or through the intervening space) demonstrate that the "median" was not designed for vehicular travel, but was designed to prevent drivers from traveling on that area.

⁵⁹ Wolfe, et al. v Dept of Transportation, Unpublished Opinion of the Court of Appeals Docket No. 245546, et al., dated July 1, 2004; Lv to Appeal Denied, 472 Mich 885; 695 NW2d 67 (2004) (footnotes omitted).

Contrary to the dissent, we believe that in determining whether the pier and attenuator were designed for vehicular travel, we must focus on the design of the highway (i.e. the markings on, and construction of, the road bed) and state law (MCL 257.644). We do not believe the actions of errant drivers establish whether a portion of a highway was designed for vehicular travel.

Highway engineers use the same highway treatments (solid yellow lines, rumble strips) as used for the cement divider in *Wolfe* to demarcate shoulders as not designed for vehicular travel. With the guidance of *Nawrocki/Evens*, the Court of Appeals in *Wolfe* focused on what was designed for vehicular travel, not what might be used (or even intended to be used) by errant drivers. In *Gregg*, the Court's analysis was just the opposite and in error. *Gregg* focused on where the traveler could travel, rather than whether the area was "designed for vehicular travel."

8. "Failure to Design" Allegations Not Within Highway Exception

Ultimately, Plaintiffs in this matter seek to have MDOT redesign shoulders in order to accommodate vehicular travel. The courts have held that a highway authority need not provide a shoulder. Yet *Gregg* declares that some shoulders could be considered designed for vehicular travel. Thus, to avoid litigation MDOT would have to design (widen) and maintain all shoulders to accommodate vehicular travel just like the travel lanes or provide no shoulder at all. In the half-dozen shoulder cases recently pending in the courts against MDOT, the issue has not been a defect in the two or three foot asphalt or cement shoulder provided, but rather a failure to maintain the area beyond the paved shoulder. 61

⁶⁰ Soule v Macomb, 196 Mich App at 235.

⁶¹ Urbis v Michigan Dept of Transportation, Claim of Appeal filed November 9, 2005 (edge drop on gravel shoulder beyond paved shoulder); Powell v Michigan Dept of Transportation, et al., Supreme Court No. 129043 (soft gravel shoulder beyond paved shoulder); Price v Michigan Dept. of Transportation, Court of Appeals No. 27577 (drain holes on edge of bridge shoulder); Ulrich v Michigan Dept. of Transportation, Michigan Court of Appeals No. 252525, Unpublished Opinion issued April 14, 2005; Supreme Court No. 128767, Application denied on October 6, 2005 (defective drainage off

It is within the road authority's discretion to determine whether to provide a shoulder, and if so, its appropriate width and composition. This Court in *Hanson v Mecosta County Rd Comm*⁶² has held that design and construction claims do not survive the broad grant of governmental immunity conferred by the Governmental Tort Liability Act. ⁶³ The *Nawrocki/Evens* Court rejected *Pick* that attempted to expand state and county road authorities' liability under the highway exception ⁶⁴ to include all the various types of traffic control devices that could be utilized on a highway. This Court noted that a road authority's duty to install traffic control devices under other statutory provisions ⁶⁵ is not incorporated in the highway exception's imposition of tort liability ⁶⁶:

[S]ubsections 609(a) and 610(a) describe the state and county road commissions' "duty" regarding traffic control devices, obviously implicating traffic signs, in terms of what each agency "deems necessary." This is the language of discretion, not the imposition of a duty, the breach of which subjects the agencies to tort liability—as opposed, perhaps, to political liability. Clearly, *Pick* undermines the exercise of judgment properly accorded to the state and county road commissions by imposing a duty on them that has no basis under the plain statutory language of the highway exception, or, for that matter, the governmental immunity statute as a whole.

This "language of discretion" is similarly embodied in the state road authorities' duty to construct, maintain and improve the highway system by incorporating shoulders, rumble strips, guardrails, attenuators and other highway safety features.⁶⁷ However, the quantity and quality of

shoulder); *Collett v Michigan Dept. of Transportation*, Michigan Court of Claims No. 05-93-MD (drain holes on edge of shoulder next to lake).

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⁶² Hanson v Mecosta County Rd Comm, 465 Mich 492; 638 NW2d 396 (2002).

⁶³ MCL 257.150, et seq.

⁶⁴ MCL 691.1407.

⁶⁵ MCL 257.609, 257.610.

⁶⁶ Nawrocki/Evens, 463 Mich at 181-182 [footnotes omitted].

⁶⁷ MCL 247.651, et seq.

these features is left to the sound discretion of the road authority. See *Ulrich v Department of Transportation*⁶⁸ (design of shoulder not within highway exception) (Appendix, pp 40-A to 42-A). As recognized in *Nawrocki/Evens*, the second-guessing of this engineering discretion is potentially limitless and not consistent with the express language of the legislature. Conversely, the maintenance and repair of the physical integrity of the roadbed surface designed for vehicular travel leaves little to discretion and is the only basis for tort liability as decreed by the Legislature under the highway exception to governmental immunity.

CONCLUSION

In overruling *Pick, Nawrocki/Evens* recognized that failure to abide by the clear language of the highway exception will lead to confusing and contradictory decisions.⁶⁹ For these same reasons, to the extent *Gregg* is inconsistent with *Nawrocki/Evens*, it too should be overturned by this Court. Actionable claims are limited to the actual physical structure of the highway "designed for vehicular travel," that being the travel lanes. Shoulders are not designed for vehicular travel and such claims do not fall within the highway exception to governmental immunity.

⁶⁸ *Ulrich v Department of Transportation*, Michigan Court of Appeals No. 252525, Unpublished Opinion issued April 14, 2005; Supreme Court No. 128767, Application denied on October 6, 2005.

⁶⁹ Nawrocki/Evens, 463 Mich at 149.

RELIEF SOUGHT

For these reasons, MDOT respectfully requests that this Honorable Court overrule Gregg and reverse the Court of Appeals decision denying Defendant MDOT's motion for summary disposition.

Respectfully submitted,

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